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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 749

DANIEL J. MOTTO, *Petitioner,*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner Daniel J. Motto prays that a writ of certiorari issue to review the judgment and opinion entered on July 8, 1969, by the United States Court of Appeals for the Second Circuit in the proceeding entitled *United States of America,* Appellee, v. *An-*

tonio Corallo, Henry Fried, Daniel J. Motto and S. T. Grand, Inc., Defendants-Appellants. A petition for writ of certiorari was filed on behalf of Antonio Corallo on September 11, 1969, No. 578, Oct. Term, 1969, and a petition for writ of certiorari was filed on behalf of Henry Fried and S. T. Grand, Inc., on September 19, 1969, No. 620, Oct. Term, 1969.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It has been printed as Appendix A (pp. 1a-56a) to the petition in the *Corallo* case, No. 578, and as Appendix A (pp. 1a-63a) to the petition in the *Fried* case, No. 620; since this petition will be considered by the Court simultaneously with the petitions in Nos. 578 and 620, the lengthy opinion of the Court of Appeals has been omitted from this petition.

The opinion of the District Court for the Southern District of New York is reported at 281 F. Supp. 24. It is reprinted as Appendix B (pp. 57a-69a) of the petition in No. 578; portions of it are reprinted as Appendix B (pp. 64a-67a) of the petition in No. 620.

JURISDICTION

The judgment of the Court of Appeals was entered on July 8, 1969. A timely petition for rehearing, together with a suggestion that the rehearing be heard in banc, was denied on August 21, 1969. On September 11, 1969, Mr. Justice Harlan signed an order extending the time for filing this petition for writ of certiorari to and including October 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an accused individual, who has already been named as a defendant in a previously prepared indictment about to be voted on by a federal grand jury and who is compelled to appear and testify before that grand jury, (a) is entitled to be given the *Miranda* warnings, (b) is entitled to a hearing on his complaint that his grand jury statements were obtained in violation of his Fifth and Sixth Amendment rights, and (c) is entitled to have his incriminating grand jury statements excluded from the trial because he was compelled to make such statements as a captive witness and without having been properly advised as to his constitutional rights to remain silent or to consult with counsel.

2. Whether an undercover Government agent, instructed by the F.B.I. to infiltrate an alleged criminal activity, can be treated in a subsequent criminal conspiracy prosecution as a co-conspirator for purposes of admission into evidence of extra-judicial statements by him or to him.

3. Whether, in a prosecution for conspiracy to violate 18 U.S.C. § 1952 by using interstate telephone facilities with intent to promote the "unlawful activity" of the commission of the New York state crime of bribery, the conviction may be sustained where there was no corroboration of accomplice testimony as required by the New York law of bribery.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution; Amendment V:

"* * * nor shall he be compelled in any criminal case to be a witness against himself * * *."

United States Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

---

18 U.S.C. § 1952:

"§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses

in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

---

18 U.S.C. § 371:

"§ 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. * * *"

STATEMENT OF THE CASE

Only those facts that underlie the questions herein presented need be set forth. A full statement of the essential facts appears in the petitions in Nos. 578 and 620 and will not be repeated here.

The Government alleged that sometime in May, 1966, James Marcus, assistant to the Mayor of the City of New York, and in charge of the Department of Water Supply, Gas and Electricity, planned to award an emergency contract for the cleaning of the Jerome Park Reservior in the City of New York. It was alleged that the petitioner Motto, along with Marcus, Itkin, Corallo and Rappaport, agreed and

conspired to negotiate with Henry Fried, president of S. T. Grand Co., to award the contract to S. T. Grand Co. in return for a "kickback" of five per cent which was to be shared by the participants. The contract was allegedly let to Grand & Co. and the agreed return of five percent paid to Marcus, Itkin, Corallo, Rappaport and Motto.

Late in 1967 a federal grand jury investigation was launched into the acceptance of bribes by New York City public officials. On December 17th, a Sunday, the petitioner Daniel Motto, the president of Local 350 of the Bakery and Confectionery Workers Union, was served with a grand jury subpoena made returnable the next morning, December 18, 1967, at 10:00 A.M. before a federal grand jury sitting in the United States District Court for the Southern District of New York.

The petitioner Motto appeared before the grand jury at the designated time and place, under the compulsory process of the grand jury subpoena, and the following questions and statements occurred (R. 1467):

> "Q. Please state your name. A. Daniel Motto, M-o-t-t-o.
>
> Q. And your address. A. 121 Birch Lane, Greenwich, Connecticut.
>
> Q. Mr. Motto, let me advise you that the grand jury before you is investigating alleged violations of Title 18, United States Code, Section 371. That section makes it a crime to conspire to commit any crime against the United States, to commit any offense against the United States.
>
> There is also a Section 1952 of the same Title which makes it a crime to use any interstate facility or telephone or to travel, or the mails, in furtherance of certain particular State offenses. In

this case the State offense that the grand jury is investigating is the offense of bribery of a local official, namely a municipal official. Do you understand that? A. Yes.

Q. And it's investigating conspiracy concerning this. I do want to advise you that you have a right to refuse to answer any questions the grand jury may ask you today the answers to which you feel they tend to incriminate you personally. Do you understand what I just said? A. Yes.

Q. However, should you answer questions, those answers could be used against you in a court of law or otherwise in the future.

[At that point the witness nodded.]

Q. You also have the right to consult with an attorney. You understand that? A. Yes, sir.

Q. Do you have an attorney here today? A. No.

Q. Let me also advise you that you are a subject of the investigation of this grand jury. Do you understand that? A. Yes, sir.

Q. How long have you lived in Greenwich, Connecticut?

* * * "

Later during the course of the grand jury interrogation the United States Attorney asked the petitioner Motto about his relationship with Carl D'Angelo, an attorney and a named co-conspirator in the indictment, which had already been prepared and was destined to be returned within the hour. The petitioner indicated that they were friends and that he wanted him to represent his union (R. 1495), but when he was asked whether D'Angelo ever represented him in any manner the petitioner answered "No, not that I know of." (R. 1497).

The United States Attorney then proceeded to elicit incriminatory statements from the petitioner Motto

in that he admitted knowing Corallo, Itkin, and Marcus and that he had dealt with them in the past.

After the United States Attorney finished interrogating the petitioner before the grand jury he was excused and subsequently arrested, less than an hour later, on the indictment which forms the subject of the prosecution. It is undenied that the indictment had already been prepared and typed before the petitioner Motto's appearance before the grand jury. This charge was undenied by the Government in a motion to suppress the petitioner's testimony before the grand jury. Thus, it is undisputed that when the prosecution compelled the petitioner Motto to appear before the federal grand jury which indicted him, the grand jury knew that he had already been named as a defendant in the indictment which was returned moments after his appearance before that body.

The petitioner's grand jury testimony was read to the trial jury in its entirety, over the objection of his defense counsel. (R. 1465-1499, 1526-1558). A motion was also made, in advance of trial, to dismiss the indictment and to suppress the evidence before the grand jury on the grounds that petitioner's rights under the Fifth and Sixth Amendments of the Federal Constitution had been violated and a hearing was requested to determine all issues relative thereto. The Court denied this motion, without opinion.

At the trial, Marcus was permitted to testify to a great number of out-of-court statements made to him by Itkin concerning the acts and declarations of the other defendants. These statements were received in evidence on the theory that they were made by Itkin as a co-conspirator, in furtherance of the alleged con-

He must, without the presence of a lawyer, exercise an independent and precarious judgment as to whether each particular question warrants his exercise of the Fifth Amendment privilege. See Meshberger, *Right to Counsel Before Grand Jury,* 41 F. R. D. 189, 200-201 (1967).*

As has been said by Judge Edgerton of the Court of Appeals for the District of Columbia Circuit, in an opinion joined by Judges Bazelon, Fahy and Wright, *Jones* v. *United States,* 342 F. 2d 863, 868 (1964):

> "Mere interrogation before a grand jury may harm the accused as much as mere interrogation at a trial. Even if he makes 'no direct incriminating statement, there is no way to know whether in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury'. United States v. Digrazia, 213 F. Supp. 232, 234 (N.D. Ill. 1963). His having been brought there may arouse suspicion. His manner and voice may arouse suspicion. Because grand jury investigations are secret, as we said in *Powell* [226 F.2d 269], he is 'isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public.' Though he may be unqualified . . . to decide for himself

* "The logic of *Escobedo* would seem to require application of its safeguards to grand jury and other investigatory proceedings, whose purposes are to determine probable guilt. Here the witness's privilege is more complicated than in police interrogations, for he can legally be compelled to answer nonincriminatory questions and will be held to have waived his privilege if he answers incriminatory ones. Until now it has been held that witnesses called to appear before such bodies have the right neither to be warned of their privilege nor to be represented by counsel so long as they have not been indicted. It is uncertain, however, whether *Escobedo* will supplant the extensive case law defining a witness's right at these investigations." *The Supreme Court, 1963 Term,* 78 Harv. L. Rev. 143, 222-223 (1964).

> what questions to answer, he must decide at his peril. If he answers incriminating questions he may make it certain . . . that he will be indicted. And testimony before the grand jury may be used . . . to impeach his testimony at trial. If he refuses to testify at all, or to answer some questions on the ground that answers might incriminate him, the grand jury may draw conclusions. If the refuses to answer questions that are not incriminating, he may be guilty of contempt."[1]

Here, then, is a situation quite unlike that involved in *In re Groban*, 352 U.S. 330 (1957), where a bare majority of this Court ruled that a mere witness called before a fire marshal investigating the causes of a fire had no constitutional right to be assisted by counsel in giving testimony before the marshal. The petitioner here was not merely a witness. The indictment had been drafted and the grand jury's investigation was completed. Less than one hour after he testified he was arrested upon the basis of the indictment. The only purpose of calling petitioner was not to aid in the completed investigation but to elicit incriminating statements or to force him into a contemptuous posture. For all practical purposes, then, the indictment had focused upon this petitioner and he was in need of the protections the Fifth and Sixth Amendments were designed to provide.

While there is dicta in *Groban* (352 U.S. at 333) that a witness before a grand jury "cannot insist, as a matter of constitutional right, on being represented by his counsel," that dicta should be re-evaluated in light of *Miranda, Escobedo* and *Messiah,* particularly as to one like petitioner who has become not only a witness but the defendant in a prepared criminal indictment.

MISSING
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The obvious importance of this question, combined with the conflict between the views expressed by the court below and the views of the four judges of the District of Columbia Circuit in the *Jones* case, makes review and resolution by this Court appropriate.

(b) Assuming that the *Miranda* warnings must be given to a person involuntarily called before a grand jury as a defendant in a prepared indictment, the ruling below that the warnings given petitioner "were completely adequate" raises serious questions as to whether there was indeed compliance with the *Miranda* requirements. A quick comparison indicates serious gaps in the warning given the petitioner:

Miranda warnings	*Petitioner's warnings*
1. He "must first be informed in clear and unequivocal terms that he has the right to remain silent." 384 U. S. at 467-468. This warning "must be accompanied by the explanation that anything said can and will be used against the individual in court." 384 U. S. at 469.	1. "I do want to advise you that you have a right to refuse to answer any questions the grand jury may ask you today the answers to which you feel they tend to incriminate you personally. Do you understand what I just said?" R. 1467. He nodded when told that "should you answer questions, those answers could be used against you in a court of law or otherwise in the future."
2. He "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during the interrogation." 384 U. S. at 471. This right "comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any	2. "You also have the right to consult with an attorney. You understand that? . . . Do you have an attorney here today?" R. 1467.

Miranda warnings	*Petitioner's warnings*
questioning if the defendant so desires." 384 U. S. at 470. It is also necessary to advise him "that if he is indigent a lawyer will be appointed to represent him." 384 U. S. at 473.	
3. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U. S. at 475.	3. The petitioner merely said "Yes" when asked if he understood he could refuse to answer any incriminating questions. He merely said "Yes" when asked if he understood he had the right to consult counsel. He merely said "No" when asked if he had an attorney here today.
4. "The warnings required and the waiver necessary . . . are, in the absence of a fully effective equivalent, prerequisites of any statement made by a defendant." 384 U. S. at 476.	4. No indication of a waiver or "a fully effective equivalent."

Apart from the fact that the petitioner Motto was not told that he was a named defendant in an indictment already prepared, the discrepancies between the *Miranda* requirements and the warnings given the petitioner Motto are serious. He was not told clearly and unequivocally that he had a right "to remain

silent," but was misled into thinking that he could refuse to answer only if he thought the answers might tend to incriminate him. While he was told he had a right to consult counsel, he was not given an opportunity to do so or even asked if he desired to exercise that right.

Indeed, petitioner was told nothing prior to the interrogation in the presence of the grand jury. And the advice that was given concerning the right to counsel and the right to remain silent as to incriminating questions was all stated in the presence of the grand jury. Even then he was not told that he had the right to have counsel and consult with him *prior* to the interrogation that was by then underway. Nor was any effort made to determine if he desired to waive the right to counsel or his privilege against self-incrimination. And no "fully effective equivalent" by way of immunity was offered him as a substitute.

A full consideration by this Court of these discrepancies is warranted by the intrinsic importance of the problems in the context of grand jury procedures. If the discrepancies are as significant as petitioner believes, the reading of his grand jury testimony to the trial jury was an obvious denial of his constitutional rights.

(c) An additional problem is raised by the refusal of the courts below to permit a hearing to determine if, as petitioner claimed, his statements were obtained from him, as a named defendant, involuntarily and in violation of his constitutional rights.

It is now axiomatic that a defendant has a "constitutional right at some stage in the proceedings to object to the use of . . . [a] confession and to have a fair

hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." *Jackson* v. *Denno*, 378 U.S. 368, 376-377 (1964). Such a hearing must take place outside the presence of the trial jury. And while *Jackson* v. *Denno* dealt with a confession rather than an admission, *Miranda* itself dealt generally with "statements obtained through interrogation" and any "evidence obtained as a result of interrogation." 384 U.S. at 478-479. In other words, insofar as admissibility is concerned, there can be no meaningful distinction between confessions and admissions. See *Jones* v. *United States*, 296 F.2d 398, 402 (D.C. Cir. 1961); *Gladden* v. *Unsworth*, 396 F.2d 373, 375 (9th Cir. 1968).

This Court should now make express that which seems inescapable—i.e., that the defendant is entitled to a *Jackson* v. *Denno* type of hearing as to the voluntariness of admissions extracted from him after he had been made a defendant in the prepared indictment.

II.

The decision below raises important questions as to the admissibility of declarations by an alleged co-conspirator as an exception to the hearsay rule.

This Court has established a policy of limiting the scope of the "very narrow exception to the traditional hearsay rule" as respects the admissibility of declarations made by a co-conspirator. *Wong Sun* v. *United States*, 371 U.S. 471, 491 (1963); *Krulewitch* v. *United States*, 336 U.S. 440, 443-445 (1949). But the ruling below that Itkin qualifies as a co-conspirator for purposes of admissibility of his out-of-court statements raises serious questions as to the vitality of that policy. Those problems arise out of the clear and undenied

testimony of Itkin that he was indeed a Government informer, secreted in the alleged conspiracy for the purpose of obtaining evidence for prosecution.

Other Circuits have held that "one who acts as a government agent and enters into a purported conspiracy in the secret role of an informer cannot be a co-conspirator" since he "secretly intends to frustrate the conspiracy." *United States* v. *Chase,* 372 F. 2d 453, 459 (4th Cir. 1967); *Sears* v. *United States,* 343 F. 2d 139, 142 (5th Cir. 1965). It would follow that the out-of-court declarations of such an informer cannot be received in evidence as the declarations of a co-conspirator under the established hearsay exception. See *United States* v. *Morello,* 250 F. 2d 631, 634 (2nd Cir. 1957); *United States* v. *Costello,* 352 F. 2d 848, 855 (2nd Cir. 1965).

This problem obviously needs definitive clarification by this Court.

III.

The decision below raises important problems as to the corroboration necessary to prove an "unlawful activity" within the meaning of 18 U.S.C. § 1952.

The Court of Appeals rejected the contention that the New York requirement of corroboration of accomplice testimony respecting the crime of bribery is applicable in the context of a federal conspiracy prosecution. That such corroboration is necessary as a matter of New York law is clear. N.Y. Code of Criminal Procedure, § 399; *People* v. *O'Farrell,* 175 N.Y. 323, 67 N.E. 588 (1903); *People* v. *Negrin,* 24 Misc. 2d 181, 201 N.Y.S. 2d 59 (1960).

An important question is thus raised as to whether the same degree of proof is required where the alleged

object or purpose of the federal crime of conspiracy is the "unlawful activity" of committing a violation of the New York bribery statutes. In other words, the "unlawful activity" mentioned by 18 U.S.C. § 1952 is borrowed in this situation from the crime of bribery as defined and proved in accordance with New York law. There is no federal crime of bribery in issue.

There is nothing in the language, purpose or history of § 1952 to suggest that Congress intended to ignore or override the safeguards and conditions attaching to the proof of crimes under state law, where proof of an intent to commit such crimes is necessary to show the focal point of a conspiracy. And this problem, touching as it does on sensitive areas of federal-state relations, clearly warrants consideration and resolution by this Court.

CONCLUSION

The petitioner Motto also adopts and urges each of the questions asserted by the petitioners in Nos. 578 and 620 that are applicable to him and not otherwise encompassed in this petition.

It only remains to be said that a defendant in a criminal investigation should not be treated by the prosecution as game to be stalked until cornered in the grand jury room and there, stripped of all legal protection, forced into an incriminating position and then taken into captivity. What was done to the petitioner here, summoned on a Sunday to appear on the following morning before the grand jury without an adequate opportunity to obtain or consult with counsel, offers an ominous omen of things to come if some legal or constitutional limits are not placed on such prosecution tactics. It is fair to assert that, without some

intervention by this Court, federal prosecutors will be motivated to exploit the unfair procedures approved by the Second Circuit in this case.

No defendant will be safe until prosecutors are advised that such brazen breaches of a defendant's rights under the Fifth and Sixth Amendments will not be condoned. Certainly the safety and security guaranteed by those Amendments belong to all individuals, including those who have become the defendants in prepared indictments.

For these reasons, this petition should be granted and the judgment below reviewed.

Respectfully submitted,

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and others were convicted of conspiracy to violate the Interstate Travel Act (18 U.S.C. 1952) by using the facilities of interstate commerce to commit bribery in violation of State law. The evidence showed a scheme by the conspirators to arrange a kickback if Mr. Marcus, then Water Commissioner of New York City, awarded a large con-

tract to S. T. Grand, Inc. for cleaning the Jerome Park Reservoir in the Bronx.[1] The interstate use of the telephone between New York and Connecticut was an integral part of the unlawful activity.

Petitioner contends that his constitutional rights were infringed before the federal grand jury; that one Itkin, who testified against the defendants, did not participate in the conspiracy as an actual member thereof but rather as a government informer; and that the trial judge erred in not instructing the jury, in accordance with New York but not federal law, that the testimony of an accomplice required corroboration. Petitioner's claims are fully dealt with and answered in the extensive opinion of the court below, on which we here rely.[2]

---

[1] S. T. Grand, Inc. and its president, Henry Fried, co-defendant below, have filed a separate petition for a writ of certiorari (No. 620, this Term) from the affirmance of their convictions below, to which we have filed a separate response. Another member of the conspiracy convicted below, Antonio Corallo, has likewise petitioned separately for certiorari in this Court, and the government has similarly filed a separate response as to him (No. 578, this Term).

[2] As petitioner notes (Pet. 2), that opinion is set forth in the appendices to the certiorari petitions filed in the companion *Fried* and *Corallo* cases (see note 1, *supra*).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1969.

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